Filed 10/26/20 P. v. Brown CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LEON MCDONALD BROWN III, Defendant and Appellant.	B304228 (Los Angeles County Super. Ct. No. BA260644)

APPEAL from an order of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Idan Ivri and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

Petitioner Leon M. Brown III appeals from an order denying his petition for resentencing pursuant to Penal Code section 1170.95 (section 1170.95). Section 1170.95 allows eligible petitioners to obtain retroactive relief based on recent changes in the murder law. (*People v. Lamoureux* (2019) 42 Cal.App.5th 241, 249.) Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Stats. 2018, ch. 1015), effective January 1, 2019, "'amend[ed] the felony-murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.' (Stats. 2018, ch. 1015, § 1, subd. (f).)" (*People v. Verdugo* (2020) 44 Cal.App.5th 320, 325 (*Verdugo*), review granted Mar. 18, 2020, S260493.) "Prior to the enactment of Senate Bill No. 1437, . . . both the felony-murder rule and the natural and probable consequences doctrine provided theories under which a defendant could be found guilty of murder without proof of malice." (*People v. Lee* (2020) 49 Cal.App.5th 254, 260 (*Lee*), review granted July 15, 2020, S262459.)

Brown was convicted of two counts of first degree murder among other crimes. With respect to both murders, jurors found that Brown "intentionally killed the victim." Because the record shows as a matter of law that Brown harbored the intent to kill, he is ineligible for resentencing. (*People v. Allison* (Oct. 2, 2020, B300575) ___ Cal.App.5th ___ [2020 Cal.App.Lexis 925 at p. *8]; *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1138 (*Lewis*), review granted Mar. 18, 2020, S260598.) Brown does not dispute the conclusion that the record demonstrates he intended to kill the victims or that his murder convictions remain valid under

current law. We reject Brown's arguments that the trial court could not consider the record of conviction and that the trial court was required to appoint counsel for him. (See *Lewis*, *supra*, at pp. 1139–1140.) We affirm the trial court's order denying his petition for resentencing.

BACKGROUND

1. *Conviction and appeal from judgment*

In 2007, jurors convicted Brown of two counts of first degree murder, two counts of willful, deliberate, and premediated attempted murder, mayhem, attempted second degree robbery, and shooting at an occupied motor vehicle. (*People v. Brown* (Feb. 26, 2009, B200983 [nonpub. opn.].) Jurors also found true the following three special circumstances with respect to both murders: (1) Brown "intentionally killed the victim" while he was an active participant in a criminal street gang (Pen. Code, § 190.2, subd. (a)(22)); (2) Brown was convicted of multiple murders (*id.*, subd. (a)(3)); and (3) the murders were committed while Brown was engaged in, or an accomplice was engaged in a robbery (*id.*, subd. (a)(17)). The jury found that all of the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. (*People v. Brown*, *supra*, B200983.) Jurors found that in the commission of every offense, Brown "personally and intentionally fired a gun, causing death and great bodily injury," personally and intentionally fired a gun, and personally used a gun. With respect to each offense except the attempted robbery, jurors found that a principal personally and intentionally fired a gun causing death and great bodily injury, personally and intentionally fired a

gun, and personally used a gun. This court previously affirmed the judgment with minor modifications not relevant to the current appeal. (*People v. Brown*, *supra*, B200983.)

This court described the events leading to Brown's convictions as follows: On January 31, 2004, 12 friends arrived at the scene of a party in three cars. (*People v. Brown*, *supra*, B200983.) As the group neared the gate Brown "drew a gun and spoke to the group in a hostile manner," asking "where they were from" and whether they were " 'from anywhere.' " (*Ibid.*) Brown told the group to leave. (*Ibid.*) Several members of the group told Brown they would leave. (*Ibid.*)

As, the group of friends walked towards their cars, Brown asked one person, "What do you have on you?," and demanded the person's shirt. (*People v. Brown*, *supra*, B200983.) Brown then walked or ran towards one of the cars firing at it. (*Ibid.*) Witnesses heard between 10 and 30 shots. (*Ibid.*) Four persons in one vehicle were hit by bullets, and two died as a result of the gunshot wounds. (*Ibid.*) Near the scene, police recovered 27 nine-millimeter Luger cartridge casings and four .380 caliber casings. (*Ibid.*) Bullet fragments from the car were consistent with nine-millimeter rounds and one was consistent with a .380 automatic caliber round. (*Ibid.*) None of the victims saw a second shooter, but one of Brown's friends told police that a second shooter fired a TEC-9 gun. (*Ibid.*)

2. *Postconviction motion for resentencing*

On September 25, 2019, Brown filed a petition for resentencing pursuant to section 1170.95. He averred that at trial, he was convicted of first or second degree murder pursuant to the felony-murder rule or the natural and probable consequences doctrine. Brown stated that he could not now be

convicted of murder because of changes to Penal Code sections 188 and 189, effective January 1, 2019. Brown requested the trial court appoint counsel. The People opposed the petition, arguing that Brown was convicted "as an actual killer with the intent to kill, rendering him ineligible for section 1170.95 resentencing." (Boldface omitted.)

3. *Trial court order*

The trial court did not appoint counsel and summarily denied Brown's petition for resentencing. The court explained: "Having reviewed the overall court record in this matter this court rules that the petitioner is not eligible for relief pursuant to Penal Code Section 1170.95 as he was the actual killer which caused the death of the underlying victims in this case. . . . Moreover, based upon the examination of the evidence, aside from being characterized as the actual killer in the instant scenario, the petitioner would further be ineligible for relief under SB 1437 as he had the specific intent to kill as well as being a major participant who acted with reckless indifference to human life."

DISCUSSION

Senate Bill No. 1437 made statutory changes that no longer permit a defendant to be convicted of murder without proof of malice. (*Lee*, *supra*, 49 Cal.App.5th at p. 260, review granted.) The legislation also established a procedure codified in section 1170.95 that permits a defendant who has sustained a murder conviction that arguably rests on a felony-murder rule or a natural and probable consequences theory of liability to petition the sentencing court to vacate the murder conviction if inconsistent with the now-governing law. (Section 1170.95;

see also *Lee*, *supra*, at p. 257.) The procedure, codified in section 1170.95, allows persons convicted of felony murder or murder under a natural and probable consequences theory to file a petition to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts. (*People v. Turner* (2020) 45 Cal.App.5th 428, 433–434; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1016, review granted Mar. 11, 2020, S259948.)

A person is eligible for relief under section 1170.95 only if the following conditions are established: "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine[;] [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder[;] [¶] [and] (3) The petitioner could not be convicted of first or second degree murder because of changes to [Penal Code] Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a)(1)–(3).) As set forth above, those changes affect the mental state requirement for murder under the felony-murder rule and the natural and probable consequences doctrine. (*People v. Lamoureux*, *supra*, 42 Cal.App.5th at pp. 262–263.)

A. Brown is Ineligible for Resentencing as a Matter of Law

Section 1170.95, subdivision (c) provides: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court

shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor['s] response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." (§ 1170.95, subd. (c).) Thus, under the statute, if the petitioner made a prima facie showing of eligibility, the trial court shall issue an order to show cause. The statute describes additional steps if the petitioner sets forth a prima facie case showing that he or she is eligible for relief under section 1170.95.

A petitioner is ineligible for relief under section 1170.95 as a matter of law if the petitioner "was convicted on a ground that remains valid notwithstanding Senate Bill [No.] 1437's amendments to [Penal Code] sections 188 and 189." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 330, review granted.) Turning to this case, the amendments to section 188 and 189 did not affect Brown's conviction, and he does not argue otherwise. The jury verdict demonstrates that Brown was the actual shooter and acted with malice.[1]

Here, jurors also found that Brown "intentionally killed the victim" when it found true the special circumstance that he intentionally killed the victim while an active participant in a

---

[1] Jurors did not simply find that Brown personally and intentionally fired a gun causing death. We previously held that finding, standing alone, was insufficient to demonstrate a petitioner was ineligible as a matter of law in a case in which the jury was instructed on the natural and probable consequences doctrine. (*People v. Offley* (2020) 48 Cal.App.5th 588, 598–599.)

gang. As respondent argues, the jury's findings preclude Brown from claiming that he was convicted based on vicarious liability and indicate both that he had intent to kill and that he was the actual killer. As such, Brown is ineligible for resentencing as a matter of law, and the trial court properly denied his petition. (*People v. Allison*, *supra*, ___ Cal.App.5th at p. ___ [2020 Cal.App.Lexis 925 at p. *17.)

B. The Trial Court Properly Considered the Record of Conviction

Brown argues that the trial court erred in considering the Court of Appeal's opinion, and instead was required to limit its review to the allegation in Brown's petition. Although there is a split of authority, this court has held that the trial court may consider the record of conviction and its own file in evaluating a petition for resentencing pursuant to section 1170.95. (*Lewis*, *supra*, 43 Cal.App.5th at p. 1138, review granted; cf. *People v. Cooper* (2020) 54 Cal.App.5th 106, 123 [to determine prima facie case, trial court should consider only whether petitioner files facially sufficient petition].) We explained: "Allowing the trial court to consider its file and the record of conviction is also sound policy. As a respected commentator has explained: 'It would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief. For example, if the petition contains sufficient summary allegations that would entitle the petitioner to relief, but a review of the court file shows the petitioner was convicted of murder without instruction or argument based on the felony murder rule or [the

natural and probable consequences doctrine], . . . it would be entirely appropriate to summarily deny the petition based on petitioner's failure to establish even a prima facie basis of eligibility for resentencing.' " (*Lewis*, *supra*, at p. 1138; see also *People v. Drayton* (2020) 47 Cal.App.5th 965, 979 [prima facie case under section 1170.95 similar to prima facie case in petition for writ of habeas corpus where the court may consider the record "including the court's own documents"]; *Verdugo*, *supra*, 44 Cal.App.5th at pp. 329–330, review granted [trial court should consider record of conviction in determining petitioner's eligibility]; *People v. Edwards* (2020) 48 Cal.App.5th 666, 674, review granted July 8, 2020, S262481 [same].)

Brown does not acknowledge the relevant discussion in *Lewis* and offers no reason to depart from it. Pending guidance from our high court, we adhere to the view that in evaluating a petitioner's prima facie case, the trial court may consider the record of conviction.

C. Brown Was Not Entitled to Counsel and Even if the Court Erred in Denying Counsel, Brown Demonstrates No Prejudice

Brown argues that the trial court erred in denying his petition without first appointing counsel to represent him. This court has held that the right to counsel arises only after the trial court makes a prima facie showing that the petitioner "falls within the provisions" of section 1170.95. (See *Lewis*, *supra*, 43 Cal.App.5th at p. 1140, review granted; *People v. Offley* (2020) 48 Cal.App.5th 588, 597; see also *People v. Tarkington* (2020) 49 Cal.App.5th 892, 899–900, review granted Aug. 12, 2020, S263219 [noting that numerous courts have rejected the contention that the trial court is required to appoint counsel as

soon as a petitioner satisfied the filing requirements]; but see *People v. Cooper*, *supra*, 54 Cal.App.5th at p. 123.) Pending further guidance from our Supreme Court, we adhere to our decision in *Lewis*.

Even if the court erred in denying Brown counsel, any error was harmless under any standard of prejudice. (*People v. Law* (2020) 48 Cal.App.5th 811, 826, review granted July 8, 2020, S262490 [alleged error in not appointing counsel harmless beyond a reasonable doubt].) As a matter of law, Brown was ineligible for relief. On appeal with the assistance of counsel, Brown had full opportunity to present any argument that he was eligible for relief under section 1170.95 and he offered none. Remand would thus be an idle act. (*People v. Edwards*, *supra*, 48 Cal.App.5th at p. 675, review granted.)

D. Brown Fails to Demonstrate He Was Entitled to Counsel Under the Federal or State Constitution

Finally, Brown argues that summarily denying his petition for resentencing without appointing counsel violated his constitutional right to counsel under the federal and state constitutions. We disagree.

The Sixth Amendment to the United Stated Constitution is applicable to the states through the Fourteenth Amendment, and "gives an indigent defendant facing incarceration the right to court-appointed counsel for his or her defense." (*Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, 1003 (*Gardner*).) A section 1170.95 petition involves a defendant seeking retroactive application of a change in the law, not a defendant facing incarceration seeking assistance with a defense. A section 1170.95 petition does not implicate a defendant's right to counsel under the Sixth Amendment. (*People v. Lopez* (2019)

38 Cal.App.5th 1087, 1114–1115, review granted Nov. 13, 2019, S258175); cf. *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1156 ["[T]he retroactive relief [defendants] are afforded by Senate Bill 1437 is not subject to Sixth Amendment analysis. Rather, the Legislature's changes constituted an act of lenity that does not implicate defendants' Sixth Amendment rights."].)

Similarly, the proceedings under section 1170.95 in which the trial court simply determined that Brown was ineligible as a matter of law do not implicate the right to counsel under the California Constitution. "A criminal defendant has the right under the state . . . [Constitution] to be personally present and represented by counsel at all critical stages of the trial." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 465.) "[C]ritical stages can be understood as those events or proceedings in which the accused is brought in confrontation with the state, where potential substantial prejudice to the accused's rights inheres in the confrontation, and where counsel's assistance can help to avoid that prejudice." (*Gardner*, *supra*, 6 Cal.5th at pp. 1004–1005.) *Gardner* listed proceedings that courts had identified "as critical stages to which the constitutional right to counsel attaches," including arraignments, preliminary hearings, postindictment lineups, postindictment interrogations, plea negotiations, and sentencing. (*Gardner*, *supra*, at p. 1005.) *Gardner* held that the prosecution's pretrial appeal of a suppression order also qualified as a "critical stage" under the state constitution, including in misdemeanor cases. (*Ibid.*)

Under *Gardner*'s rubric, we reject Brown's contention that a trial court's initial determination of a petitioner's eligibility under section 1170.95 is a "critical stage." The trial court's "role

at this stage is simply to decide whether the petitioner is ineligible for relief as a matter of law, making all factual inferences in favor of the petitioner." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329, review granted.) As stated in *Lewis*, the initial eligibility determination under section 1170.95 is analogous to a determination whether summarily to deny a habeas corpus petition (*Lewis*, *supra*, 43 Cal.App.5th at p. 1138, review granted), to which no constitutional right to counsel attaches. (See *McGinnis v. Superior Court* (2017) 7 Cal.App.5th 1240, 1243–1244, fn. 2 ["Any right to habeas corpus counsel, absent an order to show cause, is purely statutory . . . . ."].)

DISPOSITION

The order denying Brown's petition for resentencing pursuant to section 1170.95 is affirmed.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

SINANIAN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.